IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONTINENTAL INSURANCE CO., et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
ALPERIN, INC. et al.	:	NO. 97-1008

MEMORANDUM

Giles, J. April 27, 1998

This case involves an insurance coverage dispute between Continental Insurance Co. and Firemen's Insurance Co. of Newark, New Jersey (collectively "Continental" or "plaintiffs") and its insured, Alperin, Inc. ("Alperin"). The scope of coverage issue is prompted by an underlying civil action brought against Alperin on February 21, 1995 by the United States Department of Labor (the "DOL"). It contended that Alperin knowingly participated in various violations of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq. That action was eventually settled by the defendants in that case, including Alperin.

On February 10, 1997, Continental brought the present lawsuit seeking a declaration that the several insurance policies issued to Alperin provided neither a defense nor indemnity for the audit, investigation, litigation and settlement of the DOL claim. Alperin filed a counterclaim against Continental alleging causes of action under state law for breach of contract, promissory estoppel and bad faith.

Now before the court is Continental's motion for summary judgment. For reasons which follow, Plaintiffs' motion is granted.

FACTUAL BACKGROUND

The Alperin, Inc. and Affiliated Companies Pension Plan (the "Plan") covers certain employees of Alperin, a sewing contractor located in Scranton, Pennsylvania, and other affiliated corporations owned by members of the Alperin family. (DOL Compl. ¶ 7.) It consists of a Plan document and a trust agreement. (DOL Compl. ¶ 5.) At all times relevant to the complaint, Alperin was a Plan sponsor and, as defined pursuant to ERISA, a named fiduciary, a fiduciary of the Plan, and a party in interest. (DOL Compl. ¶ 8.)

Since at least 1986, Irwin Alperin, Myer Alperin, Jane Alperin and James Alperin (the "Alperins") had been shareholders of Alperin and its affiliated companies. (DOL Compl. ¶¶ 9-12.) Irwin and Myer Alperin had also acted as officers and members of the boards of directors, (DOL Compl. ¶¶ 9-10), and Jane Alperin had acted as the director of human resources, (DOL Compl. ¶ 11). James Alperin had been employed by Alperin since 1980, and had been vice president of administration since at least 1991. (DOL Compl. ¶ 12.)

While officers and directors of Alperin, the individual Alperins also acted as the Plan's trustees and administrators. They were named fiduciaries, fiduciaries of the Plan, and parties in interest as defined pursuant to ERISA. (DOL Compl. ¶¶ 9-12.) Since 1980, Irwin and Myer Alperin had served as trustees of the Plan, (DOL Compl. ¶¶ 9, 10), and since January 1991, when Irwin Alperin purportedly resigned, Jane and James Alperin had served as trustees of the Plan, (DOL Compl. ¶¶ 11, 12, 14). Irwin and Jane Alperin were also members of the Plan's investment and administrative committees. (DOL Compl. ¶¶ 9, 11.)

A. Underlying Department of Labor Lawsuit

During the summer of 1991, Alperin underwent a routine DOL audit of its employee benefit plans. (Defs. Br. at 4.) The DOL audit uncovered some questionable loans made by Alperin's trustees using Plan funds. (Pls. Br. at 4.) Sometime thereafter it turned into a DOL investigation. (Pls. Br. at 5.) On February 21, 1995, United States Secretary of Labor Robert B. Wright filed a lawsuit pursuant to ERISA. It covered twenty-one loans authorized by the Alperins. (DOL Compl. ¶ ¶ 1, 13.) The DOL complaint named the following defendants: Alperin, Inc.; Irwin and Myer Alperin, individually, as directors of Alperin, and as trustees of the Plan; and Jane and James Alperin, individually and as trustees of the Plan ("defendants").

Paragraph 13 of the complaint alleged that:

> For many years, the trustees of the Plan have authorized loans to family, friends, customers and business associates . . . The trustees had no formal application process and did not conduct credit checks, review borrowers' financial statements or make inquiries concerning the borrowers' financial condition. The loans had no collateral or guarantors. If the borrower was unable to meet the terms of the original loan, the loan was structured or restructured to benefit the borrower, not the Plan. When the borrower defaulted, the trustees failed to institute collection proceedings.

(DOL Compl. ¶ 13.) The complaint concluded that "[i]n essence, the trustees treated the Plan's assets as personal assets to be loaned for personal reasons." (DOL Compl. ¶ 13.)

The DOL complaint alleged that the Alperins, as Plan fiduciaries, violated ERISA by failing to discharge their duties with respect to the Plan solely in the interest of its participants and beneficiaries, and for the exclusive purpose of providing benefits and defraying reasonable expenses. (DOL Compl. ¶¶ 58(a), 64(a).) More specifically, the parties were charged with violating ERISA by causing the Plan to engage in improper transactions with parties in interest, (DOL Compl. ¶¶ 59-61, 66-67), including dealings with Plan assets in their own interest or for

their own account, (DOL Compl. ¶¶ 61(b), 64(d)). Myer and Irwin Alperin were also alleged to have acted in a transaction involving the Plan on behalf of a party whose interests were adverse to the interests of the Plan or its participants and beneficiaries. (DOL Compl. ¶ 62.)

The complaint stated that pursuant to the trust agreement, Alperin's responsibilities included appointment and removal of trustees, and that pursuant to the Plan, Alperin assigned responsibility to the board of directors to appoint and remove trustees. (DOL Compl. ¶ 16.) It alleged that at all relevant times, Alperin "was responsible for monitoring the performance of the board of directors and the trustees to ensure compliance with the ERISA." (DOL Compl. ¶ 16.) Members of the board of directors, including Irwin and Myer Alperin, purportedly did not monitor the performance of the trustees or make reasonable efforts to remedy the breaches committed by the trustees of which they had knowledge. (DOL Compl. ¶ 14.) In failing to exercise the authorities and uphold the responsibilities of a fiduciary under the Plan and trust agreement, the complaint alleged that Alperin violated ERISA as it enabled the board of directors and trustees to commit fiduciary breaches, (DOL Compl. ¶¶ 72,73), and failed to make reasonable efforts to remedy the breaches of which it knew, (DOL Compl. ¶ 73).

The DOL lawsuit sought relief under Sections 409 and 502 of ERISA, 29 U.S.C. §§ 1109 and 1132,[1] in the form of equitable remedies to redress violations, to obtain restitution

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[1] The DOL action was brought pursuant to 29 U.S.C. §§ 1132(a)(2) and (5). Section 1132(a)(2) states that a civil action may be brought "by the Secretary . . . for appropriate relief under section 1109 of this title." Section 1109(a) states that:

> [a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries . . . shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be

from Plan fiduciaries, and to enforce ERISA. (DOL Compl. ¶ 1.) Specifically, the DOL complaint sought: (1) removal of all defendants from positions as fiduciaries that they currently held with the Plan, (2) appointment of an independent fiduciary with plenary authority and control with respect to the management or administration of the Plan and its assets, (3) an order requiring the trustees, their agents, accountants, attorneys and advisors to cooperate with an independent fiduciary, or other such persons appointed by the court, and to provide it, or them, with all books, records, documents and information necessary for proper management of the Plan and its assets, (4) an order requiring defendants, jointly and severally, to restore to the Plan all losses, including interest, the Plan incurred as a result of the defendants' ERISA violations, (5) a permanent injunction enjoining defendants from serving as fiduciaries of any ERISA-covered plan, (6) a permanent injunction enjoining each of the defendants from engaging in any action in violation of ERISA, (7) an award to the plaintiff Secretary of Labor for costs, and (8) such other further relief as was equitable and just. (DOL Compl. at pp. 21-22.)

On December 19, 1996, the DOL suit was resolved by a settlement agreement and consent judgment. (Def. Br. at 17.) The individual defendants agreed to resign as trustees of the Plan, to have an independent fiduciary appointed as trustee, to pay $275,000 to the Plan, to guarantee an outstanding loan, and to pay a civil penalty. (Def. Br. at 17.) In order to minimize its potential loss, Alperin terminated the Plan and distributed the Plan benefits to its participants

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> subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Section 29 U.S.C. § 1132(a)(5) states that a civil action may be brought "by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (I) to address such violations or (ii) to enforce any provisions of this subchapter."

and beneficiaries. (Pls. Br. at 6.) Alperin paid a civil penalty of $55,000 to the DOL and an excise tax of $237,698 to the Internal Revenue Service on amounts distributed to it from the return of monies following the distribution of Plan assets. (Pls. Br. at 6.)

B. Continental's Present Declaratory Action and Defendants' Counterclaim for Breach of Contract

Relying upon various coverage exclusions in the insurance policy, by letter dated April 11, 1996, Continental informed the defendants that it refused to indemnify them or to provide a litigation defense. (Defs. Br. at 11.) By letter, dated May 17, 1995, Continental restated its declination. (Plfs. Br. at 9.) Now, Continental seeks a declaration that it had no duty to provide coverage for Alperin in the DOL matter. Defendants have filed a counterclaim under state law for breach of contract, promissory estoppel, and bad faith. Asserting that Continental breached its duties to defend and indemnify, defendants seek coverage for costs they incurred to defend the DOL matter and reimbursement of the civil money penalty as well as the excise tax paid.

Each Continental policy contains an Employee Benefits Coverage Endorsement (the "EBL Endorsement") providing that Continental:

> will pay those sums that the insured becomes legally obligated to pay to an employee or former employee, or their heirs, beneficiaries or legal representatives, as damages because of a "benefit error" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages. We may at our discretion investigate any "benefit error" and settle any claim or "suit" that may result.
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> . . . .
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments.

(EBL coverage form, Section I, 1(a).) The policy defines "benefit error" as "any act of negligence, error, mistake or omission of an insured, or others for whom the insured is legally responsible, in the 'administration' of your 'employee benefit programs'." (EBL coverage form, Section VI, 3.) Among the definitions of "administration" are: (b) "[i]nterpretations relative to 'employee benefit programs'," and (c) "[r]ecord-keeping in connection with 'employee benefit programs';" (EBL coverage form, Section VI, 1.) The section entitled "Supplementary Payments" addresses what Continental will pay "with respect to any claim or 'suit' [it] defend[s]." (EBL coverage form, Section I.)

Continental asserts that under the unambiguous language of its policies, it did not have a duty to defend or to indemnify Alperin. Continental's basic argument is that the DOL allegations did not qualify as a "benefit error" since they were the result of defendants' deliberate mishandling and improper lending of Plan funds. Further, as in its initial declination of coverage, Continental asserts that expenses associated with the DOL complaint are excluded from coverage because of the following exceptions contained in the EBL coverage form:

> h. [a]ny claim arising out of the failure of the insured or any insurer, fiduciary, trustee or fiscal agent to perform any of their duties or obligations or to fulfill any of their guarantees with respect to
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> . . . .
>
> (2) the providing, handling or investment of funds;
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> . . . .
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> j. [a]ny claim resulting from personal profit or advantage gained by the insured without the legal right to the gain;
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> . . . .
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> l. [t]he liability of any insured for taxes, fines or penalties imposed by law .

(EBL coverage form, Section I, 2.)

On the other hand, defendants' general assertion is that a fair reading of the DOL complaint shows that it fell within the scope of Continental's coverage. They assert that the allegations resulted from "negligence, error, mistake or omission" in the interpretation or record-keeping of its employee benefit programs. (Defs. Br. at 27-29.) Alternatively, the defendants argue that the DOL complaint comes within the scope of the "Supplementary Payments"policy provision, and offer that the provision, thus, encompassed all claims whether Continental had a duty to defend or not. (Defs. Br. at 19-20.)

Defendants assert that Continental had the discretion "to investigate any 'benefit error' and settle any claim or 'suit' that may result" even if the complaint did not obligate Continental to provide coverage under the terms of the policy. (EBL coverage form, Section I, 1(a).) They further argue that Continental agreed to represent the claim and, therefore, is estopped from now not doing so. (Defs. Br. at 20-23.)

C. Defendants' Counterclaim of Promissory Estoppel and Bad Faith

Defendants assert that within months after the DOL audit began in 1991, Myer Alperin, after finding that the audit was more extensive than he had initially expected, spoke to his attorney, Morey Myers, and notified the Murray Insurance Co. ("Murray Insurance") of events that had developed. (Myer Alperin Dep. Tr. at 18.) Brian Murray, owner of Murray Insurance, testified that after learning of the DOL audit investigation from Myer Alperin, (Brian Murray Dep. Tr. at 8), he instructed Chris Oliver, Murray Insurance's vice president, to report the claim to Continental. (Murray Dep. Tr. at 9.) Oliver explained that it was her understanding

that Myer Alperin had retained Myers as private counsel, and was requesting that Continental pay for Myers to continue to handle the DOL matter. (Oliver Dep. Tr. at 32-33.)

Oliver testified that as normal procedure she reported the claim to Continental via an ACORD form and memo, dated September 25, 1991, in which she requested that attorney Myers handle Alperin's claim. (Oliver Dep. Tr. at 33.) According to Oliver, Robert Beretski, the adjustor assigned by Continental, telephoned her a few weeks later. (Oliver Dep. Tr. at 33.) Oliver stated that she again inquired about Myers' representation, and that Beretski responded that it was no problem, tell him "to proceed." (Oliver Dep. Tr. at 33-34.) Defendants take the position that either Oliver was told by Beretski that Continental would pay the cost of defense or, at least, was left with the impression that Beretski agreed on behalf of Continental to pay for Myers' services. (see Oliver Dep. Tr. at 50.) Murray testified that after speaking with Oliver, he told attorney Myers that Continental had approved him to represent Alperin. (Murray Dep. Tr. at 12).

DISCUSSION

A.. *Duty to Defend*

Under Pennsylvania law[2], an insurer's duty to defend is determined solely from the allegations in the underlying complaint giving rise to the claim against the insured. Lebanon Coach Co. v. Carolina Cas. Ins. Co., 450 Pa. Super 1, 14, 675 A.2d 279, 286 (1996).

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[2] Pennsylvania law governs this dispute. See Centennial Ins. Co. v. Meritor Sav. Bank, Inc., 1992 WL 164906, at *2 (E.D.Pa. July 6, 1992) (holding that "an insurance contract is governed by the law of the state in which the contract was made"), aff'd, 993 F.2d 876 (3d Cir. 1993); Crawford v. Manhattan Life Ins. Co., 221 A.2d 877, 880 (Pa. Super. Ct. 1966).

Determining the duty to defend under an insurance policy is a question of law requiring only an examination of the language of the policy at issue and the allegations in the underlying complaint. Gene's Restaurant, Inc. v. Nationwide Ins. Co., 519 Pa. 306, 308, 548 A.2d 246, 246-247 (1988). An insurance policy must be read as a whole and be construed according to the plain meaning of its terms. C.H. Heist Caribe Corp. v. American Home Assur. Co., 640 F.2d 479, 481 (3d Cir. 1981); Atlantic Mut. Ins. Co. v. Brotech Corp., 857 F. Supp. 423, 427 (E.D.Pa. 1994), aff'd, 60 F.3d 813 (1995). A court "should not torture the language of the policy to create ambiguities." Id. "Where the language of the contract is clear, a court is required to give the words their ordinary meaning." Id.; see Gene & Harvey Builders, Inc. v. Pennsylvania Mfrs' Ass'n Ins. Co., 512 Pa. 420, 426, 517 A.2d 910, 913 (1986) (holding that courts enforce the plain meaning of unambiguous policy language as a matter of law); Adelman v. State Mut. Auto Ins.. Co., 255 Pa. Super. 116, 123, 386 A.2d 535, 538 (1978) (holding that courts may not rewrite the terms of an unambiguously worded policy).

1. Coverage of the DOL Audit and Investigation

Continental's policies state that it has "the right and duty to defend any 'suit'" seeking damages to which the insurance applies. (EBL coverage form, Section I, 1 (a).) The term "suit" is limited by the policies to a "civil proceeding." (EBL coverage form, Section VI, 6.) Continental asserts that it had no duty to defend under the policies unless and until a "suit" seeking potentially covered damages was filed. (Plfs. Br. at 13.) Therefore, Continental submits that the DOL's audit and investigation of Alperin do not fall within the scope of coverage as designated by the terms of its insurance policies.

Defendants do not argue that the DOL's audit and investigation involved a "suit" as defined in the policy. Instead, they argue that Continental's policies provided that since it had the discretion to "investigate any 'benefit error' and settle any claim or 'suit' that may result," it had a duty to defend (Defs. Br. at 19 (quoting EBL coverage form, Section I, 1(a)(2).) Further, defendants assert that the insurance policy recognizes an obligation to pay sums or perform acts or services which are explicitly mentioned under the "Supplementary Payments," regardless of coverage. (Defs. Br. at 19.) That provision details the expenses that Continental will pay "with respect to any claim or 'suit' [it] defend[s]." (EBL coverage form, Section I.) Defendants argue that a fair reading of the policy provides that Continental will pay expenses with regard to any claim. (Defs. Br. at 19.)

The court finds that under the unambiguous terms of the policy, Continental could not have had a duty to defend prior to February 21, 1995 as there was no "suit" for potentially covered damages. The plain terms of the insurance policies show that Continental had no duty to defend Alperin unless and until a "suit," or "civil proceeding," was filed. Even if Continental had the discretion to "investigate any 'benefit error' and settle any claim or 'suit' that may result," it had no duty to defend prior to the filing of the lawsuit. Obligations under the "Supplementary Payment" provisions are unambiguously limited to supplemental costs for claims and suits that Continental actually defends.

2. Coverage of the DOL Lawsuit

The EBL endorsement obligated Continental to "pay those sums that the insured becomes legally obligated to pay to an employee or former employee, or their heirs, beneficiaries or legal representatives as damages because of a 'benefit error'." The policy defines the term

"benefit error" as an act of 'negligence, error, mistake or omission of an insured, or others for whom the insured is legally responsible, in the 'administration' of [its] 'employee benefit programs'."

Continental asserts that it did not have a duty to defend or indemnify the defendants from allegations in the DOL complaint as they did not qualify for coverage under the terms of the policy. It submits that the DOL's allegations that Alperin misused Plan funds do not fall within the definition of a "benefit error" since they do not involve acts of "negligence, error, mistake or omission" in the administration of an employee benefit program. (Plfs. Br. at 14-15.) Further, since the underlying DOL complaint sought equitable remedies and restoration of losses to the Plan, Continental argues that these penalties could not be reasonably understood to include "sums payable to employees, or their heirs, beneficiaries or legal representatives," and, therefore, are not "damages" as defined by the Plan. (Plfs. Br. at 15-18.)

On the other hand, the defendants assert that a fair reading of the allegations shows that the alleged acts could be construed as having been the result of "negligence, error, mistake or omission of the insured," (Defs. Br. at 27), or "others for whom the insured, is legally responsible," (Defs. Br. at 27). They argue that the DOL's allegations involved the "administration" of "employment benefit programs" as defined in subsection (b) of the policies, addressing interpretations relative to pension plans, and subsection (c), addressing record keeping in connection with the pension plan. (Defs. Br. at 27-29.) Further, defendants argue that the DOL complaint sought "damages" as defined by the policy, as it required the defendants to restore losses to the Plan. (Defs. Br. at 29-30.) They assert that restoration of the Plan was, in essence, payment to participating employees or their representatives within the meaning of the

policy, (Defs. Br. at 29-30.) In the alternative, the defendants rely on the DOL complaint's catch-all request for "other relief," to argue that the court could have provided relief in the form of damages payable directly to employees or their representatives. (Defs. Br. at 30.)

The court finds that under the plain meaning of the policy language, Continental did not have a duty to provide coverage for the DOL lawsuit. Allegations in the DOL complaint that defendants intentionally breached their fiduciary duties imposed pursuant to ERISA by mishandling Plan funds for personal advantage for themselves or others, clearly do not qualify as a "benefit error" and do not fit within the definition of "administration." Allegations that the trustees failed to carry out their duties do not comport with "interpretations relative to 'employee benefit programs'." Allegations that trustees' failed to adopt formal application process, to make and review credit checks, and to properly monitor repayment, do not embrace "record-keeping in connection with 'employee benefit programs'." In order to accept the arguments advanced by defendants, the court would have to do more than torture the plain language of the policies.

Further, the court finds and concludes that the DOL complaint did not seek sums that Continental was obligated to pay as "damages" as the term is defined in its policies. The DOL sought injunctive and equitable relief pursuant to Sections 409 and 502 of ERISA, 29 U.S.C. §§ 1109 and 1132, to redress violations, to obtain restitution to the Plan of monies improperly used by Plan fiduciaries, and to enforce ERISA provisions. The complaint did not seek recoveries to employees or their representatives, but instead sought to have the defendants "make good to [the Plan] any losses" resulting from breaches of fiduciary duties and "to restore to [the Plan] any profits" of such fiduciary. 29 U.S.C. § 1109. The DOL complaint's boilerplate request for "other and further relief" did not give rise to coverage. The DOL was not seeking

"damages" as defined under Continental's policies. The purpose of the complaint was to reestablish the Plan's integrity, not to pay benefit claims. There is no legal authority, or evidentiary support in the terms of the policy, for defendants' proposition that restitution to the Plan was, in essence, recovery to employees or representatives. To the contrary, Continental's policies expressly distinguish between pension plans and employees or their representatives.

3. Exclusions from Coverage

Exclusions from coverage contained in an insurance policy are effective against an insured only if they are clearly worded and conspicuously displayed, irrespective of whether the insured read the limitations or understood their import. Pacific Indemnity Co. v. Linn, 766 F.2d 754, 761 (3d Cir. 1985)); Standard Venetian Blind Co. v. American Empire Ins. Co., 503 Pa. 300, 307, 469 A.2d 563, 567 (1983). Here the exclusions are plain and, as applied, obvious.

Exception (h)(2) to the EBL endorsement excludes from coverage "[a]ny claim arising from the failure of the insured or any insurer, fiduciary, trustee or fiscal agent to perform any of their duties or obligations or to fulfill any of their guarantees with respect to . . . the providing, handling or investment of funds." Exception (j) states that coverage does not apply to "[a]ny claim resulting from personal profit or advantage gained by the insured without the legal right to the gain," and exception (l) excludes "[t]he liability of any insured for taxes, fines or penalties imposed by law." Continental asserts that the foregoing exceptions to the EBL endorsement, clearly state that policy coverage does not apply to the DOL's allegations.

The defendants assert that the coverage exclusives set forth by Continental in subsection (h)(2), do not preclude the possibility of coverage as the DOL complaint raised allegations against various defendants in various capacities. (Defs. Br. at 33.) The defendants

assert that the DOL's allegations were not limited to only the providing, handling or investment of funds. (Defs. Br. at 33-34.) Defendants assert that exception (j) does not apply, and argue that the DOL complaint did not allege that any of the Defendants, as individuals serving in different capacities, enjoyed "personal profit" or "advantaged gain." (Defs. Br. at 34). Further, defendants argue that exclusion (l) is not applicable as the DOL complaint sought not only remedial relief, but relief which was just, as determined by the court, (Defs. Br. at 34),and point out that the consent judgment required among other things, that all participants and beneficiaries be paid in full. (Defs. Br. at 30.)

While the plain meanings of the terms of Continental's policies bar coverage for the DOL complaint, the exceptions to the EBL endorsement exclude coverage as well. The DOL complaint sought equitable remedies pursuant to ERISA in order to redress ERISA violations, obtain restitution from Plan fiduciaries, and to enforce ERISA. Against all defendants, the DOL complaint clearly focused on the deliberate mishandling and misdirection of trust funds. In Paragraph thirteen, addressing general allegations, the complaint states that it covered twenty one loans authorized by trustees of the Plan, in which the trustees "[i]n essence treated the Plan's assets as personal assets to be loaned for personal reasons." (DOL Compl. at ¶ 13.) It is clear that the allegations set forth against all defendants, were excluded by one or more of the exceptions set forth in the EBL endorsement.

4. Promissory Estoppel

The defendants argue that even if Continental did not have a duty to provide coverage under its insurance policies there are questions of fact as to whether or not the DOL allegations, through the actions of Continental's employees and/or agents, became a claim which

Continental agreed to "defend" in 1991. (Defs. Br. at 23.) Alperin argues that "based on the record as developed at this time, it could be concluded by the jury that the insurance carriers, at least Continental, agreed to defend the insureds in 1991." (Defs. Br. at 20.) Alperin claims that attorney Myers was contacted by Murray in 1991 advising him that he was approved by Continental to represent the Alperins, (Defs. Br. at 23), and that it could easily be inferred by a jury, that Murray Insurance was an agent of Continental in 1991, (Defs. Br. at 23).[3]

The defendants have the burden of establishing their right to invoke the doctrine of estoppel, Pfeiffer v. Grocers Mut. Ins. Co., 251 Pa. Super. 1, 6-7, 379 A.2d 118, 121 (1977), and must establish each and every element by "clear, precise and unequivocal evidence," Blofsen v. Cutaiar, 460 Pa. 411, 417, 333 A.2d 841, 844 (Pa. 1975). "Promissory estoppel requires that [the defendants] reasonably rely on a definite promise to their detriment." Joseph v. Pizza Hut of America, Inc., 733 F. Supp. 222, 226 (W.D.Pa. 1989).

Any claim of defendants under a theory of promissory estoppel would fail, as they cannot establish under the available facts that any reliance they had would have been reasonable.[4] The terms of Continental's policies excluded coverage of the allegations made by the DOL. As

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[3] Defendants' argument addresses only those expenses incurred for legal services provided by attorney Myers in defense of the DOL audit. Alperin does not argue that there was any promise by Continental to pay anything other than the continued services of Myers to defend against the DOL matter initially. The declination letter clearly notified the defendants that Continental was not going to provide coverage of the DOL complaint.

[4] Continental takes the position that many of the fees and costs at issue were not incurred by Alperin but were instead incurred by the Plan. (Pls. Br. at 36.) If this is indeed correct, the defendants would not be able to establish promissory estoppel in any event since they could not demonstrate that they relied to their detriment. See Mendel v. Home Ins. Co., 806 F. Supp. 1206, 1214-15 (E.D. Pa. 1992) (holding that under Pennsylvania law, a party must demonstrate detrimental reliance or actual prejudice based upon the insurer's delay in disclaiming coverage.)

addressed above, the policies covered "benefit errors" in the "administration" of employee benefit programs, and not the deliberate actions of mishandling and improperly lending actions by Plan trustees. In addition, the EBL endorsement explicitly stated that Continental would provide coverage for "suits," or "civil proceedings," and not for other types of claims. The nature of the DOL allegations should have alerted the defendants that coverage would not be provided under Continental's policies. Even if Murray suggested, or said, otherwise, reliance by the defendants would not have been reasonable under the circumstances.

In addition, the purported promise upon which defendants claim they relied was not definitive. Oliver has testified that Beretski did not expressly agree to pay defense costs. (Oliver Dep. Tr. at 43.) Further, neither Oliver nor Alperin received anything in writing from Continental confirming that it agreed to pay for the defense of the DOL matter. (Oliver D.T. at 34, 50.)

II. *Duty to Indemnify*

"An insurer's duty to defend is a distinct obligation, different from and broader than its duty to provide coverage." Lebanon Coach Co., 450 Pa. Super. at 14, 675 A.2d at 286. "An insurer has a duty to indemnify its insured only if it is established that the insured's damages were actually within the policy coverage." Lucker Mfg., A Unit of Amclyde Engineered Products, Inc. v. Home Ins. Co., 23 F.3d 808, 821 (3d Cir. 1994).

The defendants assert that Continental is required to indemnify them for the civil money penalty paid to the DOL and for excise taxes paid to the IRS. For all the reasons stated above, addressing the duty to defend, these monies do not fall within the scope of Continental's

policies, and are explicitly excluded by its exceptions. Furthermore, exception (l) to the EBL Endorsement explicitly excludes from coverage "liability of any insured for taxes, fines or penalties imposed by law."

III. *Defendants' Bad Faith Claims*

The defendants argues that even if its breach of contract and promissory estoppel claims are dismissed, summary judgment should not be entered as to the entire case in light of the third circuit's recent opinion in Polselli v. Nationwide Mutual Fire Insurance Company, 126 F.3d 524 (3d Cir. 1997). In its supplemental brief, the defendants assert that Polselli holds that the bad faith claim can be pursued without regard to the breach of contract and promissory estoppel claims."

Defendants have misread Polselli. In that case, the court held that "[a]bsent a predicate action to enforce some right under an insurance policy, an insured may not sue an insurer for bad faith conduct in the abstract." Id. at 530. The third circuit pointed out that under 42 Pa. Cons. Stat. Ann. § 8371, "[i]nstead of creating a cause of action for bad faith conduct that can exist in a vacuum, the Pennsylvania legislature provided an insured with additional remedies upon a finding of bad faith made in a predicate action under an insurance policy." Id.

The court recognized that § 8371 provided an "independent cause of action to an insured that is not dependent upon success on the merits, or trial at all, of the contract claim," Id. at 529 (citing Nealy v. State Farm Mut. Auto Ins. Co., 695 A.2d 790, 793 (Pa. Super. 1997)). However, the court concluded that the "separate and independent cause of action for bad faith" must still be an action "arising under an insurance policy." Id. While finding that an insured

may proceed to trial on a bad faith claim after settling a claim under an insurance policy, Id. at 530, or where the insured is unable to bring the contract case due to the running of the applicable limitations period, Id. n.4, the court found that "[a]t the very least . . . the predicate policy cause of action must be ripe before a section 8371 cause of action may be recognized," Id. (citing Doylestown Elec. Supply Co. v. Maryland Cas. Ins. Co., 942 F. Supp. 1018, 1019-20 (E.D.Pa. 1996); see Messina v. Liberty Mut. Ins. Co., 1996 U.S. Dist. LEXIS 9153 (E.D.Pa., July 1, 1996). Thus, the third circuit did not hold, as the defendants assert, that a bad faith claim may be pursued where the insurer is found to be without fault and the insured's case is dismissed on the merits.

Here, the insurer had no contractual obligation to provide coverage. Because the defendants' breach of contract and promissory estoppel claims fail on the merits, there is no cognizable bad faith claim.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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	:	
v.	:	
	:	
ALPERIN, INC. et al.	:	NO. 97-1008

ORDER

AND NOW, this 27th day of April 1998, upon consideration of plaintiffs' Motion for Summary Judgment and defendants' responses thereto, it is hereby ORDERED that plaintiffs' Motion is GRANTED. JUDGMENT is hereby entered in favor of plaintiffs and against defendants.

BY THE COURT:

JAMES T. GILES, J.